MELVIN HELIT
A-ABLE PLUMBING, INC.

IBLA 88-524, 89-130 Decided August 10, 1989

Consolidated appeals from decisions of the California State Office, Bureau of Land Management, denying protests against mineral patent application CACA 19642 and declaring mining claims invalid. CA MC 196855, CA MC 196856.

Motion to dismiss denied; decisions affirmed in part and affirmed as modified in part.

1. Appeals--Mining Claims: Determination of Validity--Rules of Practice: Appeals: Standing to Appeal

   A mining claimant has standing to appeal from decisions declaring his claims invalid.

2. Applications and Entries: Generally--Mining Claims: Lands Subject to--Mining Claims: Patent--Segregation

   Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

3. Contests and Protests: Generally--Mining Claims: Contests--Mining Claims: Patent

   When a rival mining claimant files an adverse claim against a mineral patent application, the adverse claimant is required to commence proceedings in a court of competent jurisdiction within 30 days after filing his claim, and failure so to do shall be a waiver of his adverse claims.

4. Appeals: Generally--Contests and Protests: Generally--Mining Claims: Contests--Rules of Practice: Appeals: Failure to Appeal--Rules of Practice: Private Contests

   The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a

later protest to the extent that the appeal involves issues resolved in the contest decision.

5. Mining Claims: Determination of Validity--Mining Claims: Location--Mining Claims: Relocation

No amended location of a mining claim is possible if the original location was void. Filing an amended notice of location in such circumstances establishes no new rights.

6. Contests and Protests: Generally--Mining Claims: Contests--Mining Claims: Patent

Where an application for mineral patent of lode claims is filed and no adverse claim is asserted as required by 30 U.S.C. § 30 (1982), the character of the deposit as lode is conclusively established as to any adverse claimant, and a subsequent challenge by such claimant asserting the claimed deposits are placer is properly rejected.

7. Mining Claims: Generally--Mining Claims: Patent--Patents of Public Lands

A corporation organized under the laws of the United States or of any state or territory thereof may occupy and purchase mining claims from the Government, irrespective of the ownership of stock therein by persons, corporations or associations not citizens of the United States.

APPEARANCES: Melvin Helit, pro se, and for A-Able Plumbing, Inc.; William R. Marsh, Esq., Denver, Colorado, for Gold Fields Mining Corporation.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

These appeals concern two decisions of the California State Office, Bureau of Land Management (BLM), denying protests filed by Melvin Helit and A-Able Plumbing, Inc. (A-Able), Helit's business. In view of the similarity of the issues involved, we have consolidated these appeals.

First, Helit has appealed from the May 17, 1988, decision dismissing his personal protest against a mineral patent application (CA 19642) filed by Gold Fields Mining Corporation (Gold Fields) for certain mining claims encompassed by Mineral Survey (M.S.) 6900. BLM's decision also declared Helit's C-ABLE Nos. 29 (CA MC 196855) and 30 (CA MC 196856) placer mining claims "null and void in part as to the overlap area encompassed by M.S. 6900." Additionally, BLM responded to statements contained in the location notices for the C-ABLE Nos. 29 and 30 claims to the effect that Helit did not abandon any part of two earlier claims, the C-ABLE Nos. 13 (CA MC 147931) and 14 (CA MC 147932) claims, ruling that these claims were also invalid. Helit's appeal from this decision was docketed as IBLA 88-524.

On September 2, 1988, Helit filed a second protest under the name of A-Able. This protest was identical to the earlier one filed under Helit's name. 1/ By decision dated October 20, 1988, BLM again declared the C-ABLE Nos. 29 and 30 mining claims null and void in part for the same reasons stated in its May 17 decision. On October 26, BLM dismissed A-Able's protest for the same reasons stated in the May 17 decision, and again stated that the C-ABLE Nos. 13 and 14 claims were invalid. A-Able appealed. A-Able's notice of appeal is identical to that previously filed by Helit in his own name. A-Able's appeal has been assigned docket number IBLA 89-130, and, as noted above, IBLA 88-524 and 89-130 have been consolidated. 2/

A statement of the history of this dispute is elucidating. These appeals grow out of a continuing dispute between Helit and Gold Fields concerning conflicting mining claims and millsites. On October 16, 1986, Gold Fields filed its application for patent for its claims, which included lands described in M.S. 6900, which was prepared as an incident to its application for patent. The claims within M.S. 6900 are the Cholla, Desert View Nos. 1 and 2, Big Chief Nos. 1 through 4, Calcite No. 3, and Golden Annex Nos. 4 through 6, 8, A, C, D, and E lode mining claims. These claims were located at various times from December 1926 to January 1982. Additionally, Gold Fields holds various millsites in the same vicinity, some of which adjoin M.S. 6900 on its southern boundary.

There are two groups of Helit's claims involved: the C-ABLE Nos. 13 and 14 placer claims, located in February 1983, and the C-ABLE Nos. 29 and 30 placer claims, located on the same lands in July 1987. 3/

1/ According to the record, Helit is the sole owner of A-Able. Helit filed a notice with BLM on Sept. 19, 1988, requesting that BLM note that A-Able Plumbing "is an entirely separate and distinct entity from Melvin Helit." Another copy of A-Able's protest was filed with BLM on Sept. 29, 1988.

2/ Helit has pointed out that he and A-Able are distinct legal entities. While keeping this distinction in mind, we shall, for simplicity, refer to Helit and A-Able collectively as "Helit."

3/ Although the parties have acted as if the C-ABLE Nos. 29 and 30 claims cover the same ground as the C-ABLE Nos. 13 and 14 claims, we note that this is not entirely clear from the descriptions of the newer claims. The C-ABLE No. 13 claim consisted of 80 acres, described as the S\ NW^, sec. 8, T. 13 S., R. 19 E., San Bernardino Meridian. The C-ABLE No. 14 claim likewise consisted of 80 acres, described as the S\ NE^ in the same section. Although the location notices for the C-ABLE Nos. 29 and 30 claims also each claim 80 acres, they only state that each claim "is situated in," respectively, the NW^ and the NE^. Each quarter section contains an area of about 160 acres, and there is no other description to indicate where in the quarter section the 80-acre claim is located. However, the location notices for the new claims are tied to the old claims, as they expressly state that the locators do not abandon any part of the old claims, thus indicating that Helit intended the claims to cover the same ground. In this decision, without commenting on whether the description of the C-ABLE Nos. 29 and 30 claims is legally adequate, we shall assume that these newer claims cover the same ground as the older claims.

Some of Gold Fields' claims in M.S. 6900 conflicted with Helit's C-ABLE Nos. 13 and 14 claims. The Golden Annex No. 1 and Golden Annex "C" claims overlapped a small portion of Helit's C-ABLE No. 13 claim. The Golden Annex No. 6 claim overlapped very small portions of both the C-ABLE Nos. 13 and 14 claims. The remainder of the C-ABLE Nos. 13 and 14 claims was overlapped by millsite claims held by Gold Fields. However, the area in M.S. 6900 included only Gold Fields' lode mining claims, not its millsites. 4/

In 1986 Gold Fields filed a private contest complaint (CA 19054) against Helit seeking a determination that Helit's C-ABLE Nos. 13 and 14 claims were invalid insofar as they conflicted with Gold Fields' unpatented millsites. By decision dated July 22, 1987, Administrative Law Judge Morehouse ruled that the lands on which the C-ABLE Nos. 13 and 14 were located were "non-mineral in character" and that these claims (among others) were therefore invalid. Helit filed a notice of appeal, but, by order dated October 22, 1987, we dismissed the appeal as untimely. Gold Fields Mining Corp. v. A-Able Plumbing, IBLA 87-795 (Order of Dismissal, Oct. 22, 1987). As discussed below, this dismissal rendered Judge Morehouse's decision voiding the C-ABLE Nos. 13 and 14 claims final for the Department of the Interior.

While the private contest was pending, on October 16, 1986, Gold Fields filed its application for mineral patent. BLM directed publication of notice of the application for a period of 60 days, pursuant to 30 U.S.C. § 29 (1982) and 43 CFR 3862.4-6. On March 11, 1987, Helit filed a "Statement of Adverse Claim," in which he asserted a prior possessory right to some of the lands applied for by virtue of the C-ABLE Nos. 13 and 14 claims. Helit challenged the citizenship of Gold Fields and asserted that its claims were improperly designated as lode claims instead of placer claims.

On March 23, 1987, as provided in 43 CFR Subpart 3871, BLM advised both Helit and Gold Fields that Helit, as an adverse claimant, was required to commence proceedings in a court of competent jurisdiction to determine the question of right of possession to overlapping portions of M.S. 6900 and the C-ABLE Nos. 13 and 14 claims. BLM expressly warned that, "[s]hould the adverse claimant fail to take the required actions, the adverse claim will be considered waived and the application for patent will be allowed to proceed upon its merits." On May 21, 1987, having received no notification of any pending judicial proceeding, BLM issued a decision noting that Helit's adverse claim was deemed waived.

BLM then proceeded to consider the merits of Gold Fields' application for patent. On June 3, 1987, BLM issued a final certificate to Gold Fields.

4/ Since the lands in Helit's C-ABLE Nos. 29 and 30 claims are presumptively the same as those in his C-ABLE Nos. 13 and 14 claims, the Golden Annex No. 8 and Golden Annex "C" claims also overlap a small portion of Helit's C-ABLE No. 29 claim. Likewise, the Golden Annex No. 6 claim overlapped very tiny portions of both the C-ABLE Nos. 29 and 30 claims, and the remainder of the C-ABLE Nos. 29 and 30 claims was overlapped by Gold Fields' millsites.

On July 19, 1987, Helit's C-ABLE Nos. 29 and 30 placer claims were located. As noted above, these claims apparently include the same lands as his C-ABLE Nos. 13 and 14 claims. Thus, these later claims also conflicted with Gold Fields' lode and millsite claims (see note 4, supra).

On April 11, 1988, Gold Fields withdrew the Golden Annex No. 8 and Golden Annex "C" lode claims from its patent application, and on April 25, 1988, BLM accepted this withdrawal. This action removed some of the area that conflicted with Helit's claims from the application. However, as discussed below, two small overlaps remained between Helit's claims and the Golden Annex No. 6 claim, which was retained in the patent application.

On April 25, 1988, Helit filed the first of the two protests against Gold Fields' mineral patent application. The principal assertion of Helit's protest was that, as he had previously alleged, Gold Fields is not a citizen of the United States as required by 30 U.S.C. § 22 (1982) and is therefore unqualified to locate and apply for patent to a mining claim. Helit also asserted that Gold Fields improperly located the claims as lode claims, and that Gold Fields did not locate the claims in good faith.

As noted above, on May 17, 1988, BLM dismissed this protest and ruled that the C-ABLE Nos. 29 and 30 placer claims were "null and void in part as to the overlap area encompassed by M.S. 6900." Helit filed the second protest, under the name of A-Able in September 1988. By decision dated October 20, 1988, BLM again declared the C-ABLE Nos. 29 and 30 claims null and void in part for the same reasons stated in its May 17 decision, and on October 26, BLM dismissed A-Able's protest for the same reasons stated in the May 17 decision. These appeals followed from BLM's May 17, October 20, and October 26, 1988, decisions.

On June 13, 1988, Helit filed "amended notices of location" for the C-ABLE Nos. 29 and 30 claims. 5/ These notices also provided that, if the original claims were void for any reason, the notices were to be considered as "original location notices." The effect of these notices is discussed below.

[1] Gold Fields and BLM have moved to dismiss these appeals on the ground that Helit no longer has any interest in the land at issue or in adjoining land which is adversely affected by BLM's denial of his protests. BLM's decisions, however, not only denied Helit's protests; they also declared his C-ABLE Nos. 29 and 30 mining claims invalid because the land was segregated from entry upon issuance of the final certificate to Gold Fields. BLM also commented unfavorably in these decisions on the validity of the C-ABLE Nos. 13 and 14 claims. This Board receives numerous appeals from BLM decisions which declare mining claims invalid because the land was not subject to location. E.g., Pathfinder Mines Corp., 70 IBLA 264, 90 I.D. 10 (1983), aff'd, Pathfinder Mines Corp. v. Hodel, 811 F.2d 1288 (9th Cir. 1987). Such appeals are not dismissed; they are decided on their merits.

5/ Gold Fields' motion to dismiss includes copies of the amended location notices.

Accordingly, we deny the motions to dismiss and will consider the merits of the appeal. 6/

[2] As BLM noted in its decision declaring the C-ABLE-29 and C-ABLE-30 mining claims null and void in part, these claims were located after the issuance of a final certificate of mineral entry to Gold Fields. BLM referred to our decision in Scott Burnam, 100 IBLA at 110, 94 I.D. at 437:

> With issuance of a Final Certificate of mineral entry, the land encompassed by the mining claim is segregated from the location of other claims and may not be located by another. Union Oil Company of California, 65 I.D. 245, 253 (1958); McCormack v. Night Hawk &

6/ We acknowledge that there is a question of whether Helit has standing to appeal from the denial of his protests, and that this question might be considered separately from the question of his standing to appeal BLM's decisions to invalidation of his claims. However, were we to consider his standing to appeal the denial of the protests separately, we would rule that he does have standing.

Helit's waiver of an adverse suit under 30 U.S.C. § 30 (1982) does not necessarily preclude the filing of a protest. Essex International, Inc., 15 IBLA 232, 242, 81 I.D. 187, 192 (1974), and cases cited. The right to file a protest against action proposed to be taken by BLM extends to "any person"; there is no requirement that the person be adversely affected by the proposal. 43 CFR 4.450-2. However, although Helit was not prohibited from filing a protest, it does not follow that the dismissal of that protest is subject to appeal, as, under 43 CFR 4.410, the right of appeal is extended only to those parties to a case who can show that they are "adversely affected."

In order to be adversely affected, a protestant must have an "interest" in the land which is the subject of the protested action. The "interest" necessary for standing to appeal is not the same as the "interest" necessary to bring a contest. A contest requires "title to or an interest in land," which generally must be grounded on a statutory grant. In contrast, the interest necessary to appeal denial of a protest is neither limited to legal interests in the specific land at issue, nor to economic or property rights, It must be a legally recognizable interest, but ownership of adjoining land or past usage of the land in dispute have been recognized as giving sufficient interest. Scott Burnam, 100 IBLA 94, 119-20, 94 I.D. 429, 443 (1987) and cases cited.

Helit's standing can possibly arise from his interest in three pairs of locations: the C-ABLE Nos. 13 and 14 claims, located in 1983; the C-ABLE Nos. 29 and 30 claims, located in 1987; and the "amended notices of location" for C-ABLE Nos. 29 and 30 in 1988. As discussed below, Helit retains no valid interest in the first two pairs. However, it appears that the last location did give Helit a claim to lands adjoining those subject to Gold Fields' application for mineral patent. Specifically, these lands are those formerly overlapped by the Golden Annex No. 1 and Golden Annex "C" claims. This interest is adequate to provide him standing to appeal from denial of his protest.

> Nightingale Gold Mining Co., 29 L.D. 373, 377 (1899); Leary v. Manuel, 12 L.D. 345 (1891); F. P. Harrison, 2 L.D. 767 (1882).

Thus, in its May 17 and October 20, 1988, decisions, BLM properly declared the C-ABLE Nos. 29 and 30 mining claims null and void to the extent they overlapped M.S. 6900, because the July 19, 1987, issuance of final certificate on these lands to Gold Fields segregated them from the location of other claims.

[3] BLM also properly stated that the C-ABLE Nos. 13 and 14 claims were invalid. When Gold Fields filed its patent application, BLM directed publication of notice of the application for a period of 60 days, pursuant to 30 U.S.C. § 29 (1982) and 43 CFR 3862.4-6, in order to allow adverse claimants to come forward. The statute, 30 U.S.C. § 30 (1982), places the burden on any adverse claimant to take prompt action in court to prove the superiority of his claim:

> It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. [Emphasis added.]

Following publication by Gold Fields of notice of application, Helit did come forward with notice that his C-ABLE Nos. 13 and 14 claims were adverse to Gold Fields' claims. However, Helit filed no suit, and Gold Fields filed a certificate to that effect as required by 43 CFR 3871.6. Consistent with 30 U.S.C. § 30 (1982), BLM issued a decision dated May 21, 1987, deeming Helit's adverse claims waived.

[4] Further, the C-ABLE Nos. 13 and 14 claims, among others, were the subject of a successful private contest brought by Gold Fields against Helit, styled Gold Fields Mining Corp. v. A-Able Plumbing, CA 19054 (decided July 22, 1987). In that proceeding, Helit's claims were declared invalid because the land was not mineral in character. Helit's appeal from this decision was dismissed as untimely, rendering the invalidation of these claims final for the Department.

Under the doctrine of administrative finality, the counterpart to the judicial doctrine of res judicata, Helit is precluded from raising such issues as were resolved in the contest proceeding. Once a decision has become final action for the Department, this Board will not consider the validity of such a decision in a later appeal. George A. Haddad, Jr., 109 IBLA 394, 397 (1989); City of Klawock, 94 IBLA 107 (1986); Inexco Oil Co., 93 IBLA 351 (1986). Helit's failure to file a timely appeal from the decision in the contest proceeding precludes our consideration of issues covered by that proceeding.

[5] As noted above, in June 1988, after the issuance of BLM's decision in IBLA 88-524, Helit prepared "amended notices of location" for the C-ABLE Nos. 29 and 30 claims. BLM's decisions under review in IBLA 89-130,

although issued after these locations were made, do not consider their effect. As we stated in R. Gail Tibbetts, 43 IBLA 210, 218, 86 I.D. 538, 542 (1979) (overruled in part on other grounds, Hugh B. Fate, 86 IBLA 215 (1985)), "[n]o amended location is possible, however, if the original location was void. See Brown v. Gurney, 201 U.S. 184, 191 (1906)." Accord, Fairfield Mining Co., 89 IBLA 209, 213 (1985). Because Helit's initial notices for the C-ABLE Nos. 29 and 30 claims (those accomplished in July 1987) were void with respect to the land overlapping M.S. 6900, the amended notices could establish no new rights.

However, Helit's June 1988 "amended notices of location" also provide that they are to be considered as original location notices if the C-ABLE Nos. 29 and 30 claims were void for any reason. As original locations, the claims would still be void to the extent they described land included in the final certificate, since such land was not open to mineral entry in June 1988. Scott Burnam, supra. However, BLM had previously (on April 25, 1988) approved Gold Fields' withdrawal of the Golden Annex No. 1 and Golden Annex "C" claims from its patent application, so that, after that date, the final certificate was no longer in effect for those lands. Thus, the June 1988 filing might have succeeded in gaining Helit a cognizable interest in the lands formerly overlapped by the Golden Annex No. 1 and Golden Annex "C" claims. Furthermore, these lands adjoin the lands remaining in Gold Fields' patent application.

As discussed above at footnote 6, this possible interest was enough to provide standing to appeal from a denial of a protest against the granting of mineral patent to Gold Fields. Nevertheless, we retain doubt about the validity of this interest, as the Department would be precluded from construing the June 1988 notices as original locations if Helit did not record them as original claims within 90 days of the location date as required by the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744(b) (1982), and 43 CFR 3833.1-2(a). If Helit failed to record each claim with BLM as an original location including payment of the proper filing fee, such failure would "be deemed conclusively to constitute an abandonment of the mining claim" under 43 U.S.C. § 1744(c) (1982) and 43 CFR 3833.4. The record submitted with this appeal, however, does not indicate whether the June 1988 locations were recorded.

We note that BLM's October 20, 1988, decision did not declare Helit's June 1988 locations void with respect to their overlap with the lands remaining in the final certificate; rather, it held them void to the extent they overlap M.S. 6900. Although the Golden Annex No. 1 and Golden Annex "C" claims were no longer subject to the final certificate, it does not appear that they were removed from M.S. 6900. Presuming that the FLPMA filing requirements for these claims were met, BLM's decision in October 1988 that Helit had no valid claims on any lands within M.S. 6900 was therefore in error in this particular and is hereby modified.

However, we hold that Helit retains no cognizable interest by virtue of the C-ABLE Nos. 13 and 14 claims, the C-ABLE Nos. 29 and 30 claims, or the June 1988 locations, in any lands covered by Gold Fields' application for mineral patent, as amended. Further, our resolution of Helit's protests against him in this decision removes the last barrier to BLM's taking dispositive action on Gold Fields' application, all else being regular.

[6] In the protests and on appeal, Helit asserts that Gold Fields improperly located the claims as lodes and that the claimed deposits are placer under 30 U.S.C. § 35 (1982), which defines "placers" as "including all forms of deposit, excepting veins of quartz, or other rock in place." The Supreme Court has expressly held that the character of the deposit as lode or placer is conclusively established by the fact that no adverse claim is asserted to the application for a patent of such lands. Dahl v. Raunheim, 132 U.S. 260, 263 (1889). In essence, the Court held that the party who failed to file an adverse suit was estopped from challenging the character of the deposit in a collateral proceeding. We so hold here. Helit's failure to file suit as required by 30 U.S.C. § 30 (1982) leads to the conclusive establishment of Gold Fields' claims as lode claims as against Helit.

[7] The chief concern of Helit's protests was that Gold Fields is not qualified to receive a patent because it is not a citizen of the United States as required by 30 U.S.C. § 22 (1982). BLM's decision notes that Gold Fields is a corporation organized under the laws of the State of Delaware and is qualified to do business in the State of California. It is a wholly owned subsidiary of Gold Fields American Corporation, which is a subsidiary of Consolidated Gold Fields Limited of London, United Kingdom.

Although Helit has made extensive arguments in support of his view that Gold Fields does not qualify as a citizen, the Board has previously considered similar arguments and rejected them. In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 36-39, 90 I.D. 352, 364-65 (1983). We referred therein to the provision of 30 U.S.C. § 24 (1982) that "[p]roof of citizenship * * * may consist * * * in the case of a corporation organized under the laws of the United States, or any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation." Gold Fields has filed a certificate showing that it was organized under the laws of Delaware, and therefore has submitted adequate proof of citizenship under the quoted statutory provision. This conclusion is consistent with longstanding Departmental practice, as recognized in Doe v. Waterloo Mining Co., 70 F. 455, 462-64 (9th Cir. 1895). We previously observed:

> Practice in the Department was, indeed, as indicated by the Court. Thus, Secretary Hitchcock stated "a corporation organized under the laws of the United States or of any State or Territory thereof may * * * occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations or associations not citizens of the United States." Opinion, 28 L.D. 178, 180 (1899). This was reiterated in the Instructions published at 51 L.D. 62 (1925) relating to the right of United States Borax Company, having been acquired by Borax Consolidated, Ltd., to hold and patent mining claims. This interpretation has continued to the present day. See 43 CFR 3862.2-1; Alien Ownership of Shares in a Corporate Mining Location, M-36738 (July 16, 1968). Appellants have failed to show why this consistent interpretation, stretching over nearly a century of adjudication, should be abandoned at this late date. See State

> of Wyoming, 27 IBLA 137, 83 I.D. 364 (1976), aff'd sub nom. Wyoming v. Andrus, 602 F.2d 1379 (10th Cir. 1979). We decline to alter the rule that proof of incorporation in a state is conclusive proof of citizenship by the stockholders.

In Re Pacific Coast Molybdenum, 75 IBLA at 38-39, 90 I.D. at 365. Nor do we now find adequate reason to alter the rule.

To the extent that Helit's other assertions may be construed as an attack upon the qualifications of Gold Fields, we reject them.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motions to dismiss are denied, and BLM's decisions are affirmed in part and affirmed as modified in part.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge